

2691  
No. 12902

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United States  
Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,

Appellant,

vs.

MATSON NAVIGATION COMPANY, a Corpora-  
tion; W. R. ECKHART, TUG LOUIE III,  
Her Boilers, Engines, Tackle, Apparel, Furni-  
ture, etc., and WESTPORT TOWBOAT COM-  
PANY, a Corporation,

Appellees.

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**Apostles on Appeal**

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Appeal from the United States District Court,  
for the District of Oregon.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Proctors for W. R. Eckhart, Appellees.



In the United States District Court for the  
District of Oregon

In Admiralty  
Civil 5454

UNITED STATES OF AMERICA,  
Libelant,

vs.

MATSON NAVIGATION COMPANY, a Corporation;  
W. R. ECKHART; Tug LOUIE III,  
Her Boilers, Engines, Tackle, Apparel, Furniture,  
etc., and WESTPORT TOWBOAT  
COMPANY, a Corporation,  
Respondents.

### LIBEL

To: The Honorable Judges of the United States  
District Court for the District of Oregon sitting in  
admiralty:

The Libel of the United States of America, a  
sovereign nation, as owner and operator of the  
Dredge Multnomah, and as owner of Dike No. 67-1,  
against Matson Navigation Company, a corporation;  
W. R. Eckhart, as pilot; Tug Louie III, her  
boilers, engines, tackle, apparel, furniture, etc., and  
Westport Towboat Company, a corporation, in a  
cause of collision, statutory, civil and maritime,  
alleges as follows:

#### Article I.

Libelant is now and at all times herein mentioned  
was a sovereign nation and the sole and only owner

and operator of the Dredge Multnomah, her floating pipeline, donkey scow, pontoons and appurtenant equipment, being a non-propelled pipeline dredge of 762 gross tons and 193 feet in length, and at all times herein alleged was a floating plant used and being used in the construction of improvements of a navigable river of the United States, to wit: the Columbia River, and was anchored outside of and on the Washington side of the main channel of the Columbia River off Westport, Oregon.

#### Article II.

Libelant is now and was at all times herein mentioned the owner of that certain Dike No. 61-2 located on the Columbia River and maintained by the United States Army Engineers for the preservation and improvement of its navigable waters the Columbia River within the meaning and provisions of Section 408 of Title 33 United States Code, said Dike being at all of said times duly charted and marked as such.

#### Article III.

At all times herein mentioned the SS William Harris Hardy, Official No. 248 745, was a steam screw ocean freight vessel of 7,886 gross tons owned by the United States of America and under bareboat charter to respondent, Matson Navigation Company, a corporation, and under and by virtue of said bareboat charter the said Matson Navigation Company, a corporation, was the owner of the said SS William Harris Hardy pro hac vice.

## Article IV.

That respondent Matson Navigation Company is now and was during all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office in the City of San Francisco, California, and doing and qualified to do business in the State of Oregon.

## Article V.

That at all times herein mentioned respondent W. R. Eckhart was and now is a resident of the State and District of Oregon and was and now is a duly licensed master mariner and pilot for the Willamette and Columbia Rivers between Portland and Astoria, Oregon, and engaged in the calling of a Columbia River Pilot and was on the 21st day of December, 1946, and at the time and place of the collision hereinafter described, employed by respondent Matson Navigation Company, a corporation, in piloting the SS William Harris Hardy down the Columbia River.

## Article VI.

At all times herein mentioned respondent Tug Louie III, official No. 249 503, was an oil screw towing vessel of 60 gross tons and 320 horsepower, owned and operated by respondent, Westport Towboat Company, a corporation, which vessel is now lying afloat in navigable waters of the Columbia River within the jurisdiction of this Honorable Court, or will be within the jurisdiction of this

Honorable Court during the pendency of process herein.

#### Article VII.

That respondent Westport Towboat Company is now and was during the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Oregon with its principal place of business in the city of Westport, State of Oregon.

#### Article VIII.

On the 21st day of December, 1946, at or about the hour of 1830 (6:30 p.m., P.S.T.) and at all times prior thereto, the aforementioned Dredge Multnomah and her equipment was in a seaworthy condition, properly anchored, properly officered and manned, with proper anchorage lines and proper anchors set in the manner required by law for a dredge riding at anchor on the Washington side of the Columbia River, approximately 3200 feet downstream from Light Buoy G-2 Fl. W. in the vicinity of Westport Bar, about 166 feet upstream from Dike 67-1 and about 250 feet from the Center line of the deep water channel of the Columbia River; that said dredge complied with all of the requirements of the rules of the road for a dredge riding at anchor and complied with all the requirements that the customary Columbia River signals to be given to a vessel approaching her anchorage.

#### Article IX.

That shortly before the hour of 6:30 p.m., on

December 21, 1946, the Tug Louie III was proceeding downstream with a log raft in tow, the tow consisting of eleven sections of approximately 65 feet each, giving a total of 700 feet as the length of her tow, and was approaching the Dredge Multnomah; that after passing signals were exchanged between the Tug Louie III and the Dredge Multnomah the said Tug Louie III proceeded on a course to carry it across the channel and to the right hand side thereof, causing the log tow to foul the donkey scow's anchor cable appertaining to the Dredge Multnomah, causing the said donkey scow, with her cables, to be carried away and to drift with its pipeline across the Columbia River channel and further to cause the said Tug Louie III and its tow to collide with the Dredge Multnomah, resulting in damage to the Dredge Multnomah, her floating pipelines, donkey scow and appurtenant equipment as is hereinafter more specifically set forth.

#### Article X.

That shortly before the hour of 6:30 p.m., on December 21, 1946, the SS William Harris Hardy aforesaid, was proceeding down the Columbia River in the main channel thereof, with respondent W. R. Eckhart, a Columbia River Pilot at the conn and was approaching the point where the said Dredge Multnomah was anchored at the time aforesaid when the Tug Louie III, with its tow, had crashed into the Dredge Multnomah and was fouled with the pipeline and appurtenant equipment of the Dredge Multnomah; that notwithstanding a danger

signal having been given to the SS William Harris Hardy by the Tug Louie III, it nevertheless carelessly and negligently attempted to pass the same and in so doing collided with the end of said Dike 67-1 destroying approximately 100 feet of the outer end thereof, all to the damage of the United States of America as hereinafter more specifically set forth.

#### Article XI.

That the collision between the Tug Louie III and the Dredge Multnomah, its floating pipeline, donkey scow and appurtenant equipment and Dyke 67-1 was not caused or contributed to by any fault, negligence or want of care on the part of libelant, United States of America, or those in charge of the Dredge Multnomah or her officers or crew, but as libelant, United States of America, is informed and therefore alleges, was proximately caused or contributed thereto by the negligence and fault of the Tug Louie III and her owners, officers and operators and members of her crew; the respondent, Westport Towboat Company, a corporation, its officers, agents and employees, in the following respects, among others:

(1) That the Tug Louie III and her log tow were in an unseaworthy condition, and said tow was not properly made up for such towage;

(2) That the said Tug Louie III did not have sufficient power to properly or at all maintain control of her tow, and the towing lines and bridles were not properly placed and maintained for such towage;



(3) in attempting to pass the Dredge Multnomah in the deep main channel when her tow was drifting at an angle so as to involve her in a collision;

(4) in failure to pass in more shallow water, which could and should have been done under the circumstances then and there existing;

(5) that the Tug Louie III and respondent Westport Towboat Company violated the provisions of Section 408 et seq. of Title 33, United States Code;

(6) that the Tug Louie III was not in charge of competent persons;

(7) that the said Tug Louie III failed to maintain a proper, competent and good lookout;

(8) that the said Tug Louie III failed to alter her course to port sufficient to clear the Dredge Multnomah and its appurtenant equipment;

(9) that said Tug Louie III blocked the main deep water channel at said point, causing the said SS William Harris Hardy to turn hard to port, causing her to run upon and against Dike 67-1 and

(10) that the Tug Louie III and those in charge of her navigation were guilty of other faults which will be proven at the trial.

## Article XII.

That the said collision with Dike 67-1 was not caused or contributed to by any fault, negligence or want of care on the part of libelant, United

States of America, or those in charge of the Dredge Multnomah, or her officers or crew, but as libellant, United States of America, is informed and therefore alleges, was proximately caused or contributed to by the joint negligence and fault of the said Tug Louie III, her owners, officers, operators and members of her crew, and the Westport Towboat Company, a corporation, as hereinbefore alleged, and was also proximately contributed to the carelessness, recklessness and negligence on the part of the SS William Harris Hardy and her owners, officers, operators and members of her crew, and the respondent Matson Navigation Company, a corporation, its officers, agents and employees, and the negligence and fault of respondent W. K. Eckhart, as pilot, and the officers and members of the crew of the said SS William Harris Hardy, in the following respects, among others:

(1) That the SS William Harris Hardy and respondent W. K. Eckhart violated the provisions of Section 408 et seq. of Title 33, United States Code;

(2) that the SS William Harris Hardy was not in charge of competent persons;

(3) that the pilot, master, officers and crew of said vessel were incompetent and were not properly stationed and attentive to their duties;

(4) that the said vessel failed to maintain a proper, competent, or good lookout;

(5) that the said vessel proceeded at an immoderate and excessive rate of speed under the prevailing visibility conditions;

(6) that the vessel prior to and at the time of the collision was negligently proceeding outside the limits of the main channel of the Columbia River;

(7) that the vessel violated the Inland Rules of the Road in proceeding at an immoderate and excessive rate of speed under the prevailing visibility conditions and failed to reduce the speed of the vessel or cause the engines stopped or reversed, as required by law;

(8) that the SS William Harris Hardy failed to navigate in accordance with the danger signal given by the Tug Louie III;

(9) that said vessel failed to slow, stop, or stop and reverse her engines when danger of collision was, or should have been, apparent;

(10) that said vessel failed to slow, stop, or stop and reverse her engines, when it became apparent that she could not maneuver to port around the Tug Louie III and its tow without running upon and against Dike 67-1; and

(11) that the SS William Harris Hardy, and those in charge of her navigation, were guilty of other faults which will be proven at the trial.

### Article XIII.

In consequence of said collision, the Dredge Multnomah, its floating pipelines, donkey scow, and appurtenant equipment were injured and damaged in the amount of \$600.45, representing the reasonable cost of collision repairs and expense; and further

on consequence of said collision Dike 67-1 was injured and damaged in the amount of \$7,567.50, representing the reasonable cost of collision repairs and expenses.

For a second and separate cause of action, libellant, United States of America, alleges:

#### Article I.

Repeats and realleges, as though fully set forth herein, all of the allegations of Articles I, II, III, IV, V, VI and VII of the first cause of action hereinabove set forth.

#### Article II.

That prior to and on the 21st day of December, 1946, the Dredge Multnomah was lying at anchor on the Washington side of the Columbia River approximately 3200 feet downstream from Light Buoy G-2, Fl.W. in the vicinity of Westport Bar, about 1600 feet upstream from Dike 67-1, and about 250 feet from the center line of the deep water channel of the Columbia River, bow downstream, parallel with the main channel, but outside, on the right hand side, going down river, with its floating pipeline extending 300 feet directly up river astern of the dredge and paralleling the channel, and with a pipeline connected to a small steam donkey scow, which was anchored and had been and was engaged in the construction, on behalf of the United States of America, in the improvement work for the preservation and improvement of the Columbia River, a

navigable river, said dredge and its equipment constituting a floating plant used in the construction of such work within the meaning and provisions of Section 408 et seq., Title 33, United States Code.

### Article III.

That immediately downstream and approximately 1600 feet from the Dredge Multnomah in the said Columbia River was Dike 67-1, built by libelant, United States of America, for the preservation and improvement of the Columbia River.

### Article IV.

That on the 21st day of December, 1946, at about 1830 (6:30 p.m., P.S.T.) respondent vessel Tug Louie III, while proceeding down the main channel of the Columbia River collided with and caused serious damage to said Dredge Multnomah, her donkey scow, pipeline, and appurtenant equipment, the reasonable cost of repairs and expenses being the amount of \$600.45.

### Article V.

That on the 21st day of December, 1946, immediately after 1830 (6:30 p.m., P.S.T.) respondent vessel SS William Harris Hardy, while proceeding down the main channel of the Columbia River with respondent W. R. Eckhart as pilot at the conn on board said vessel collided with and caused serious damage to Dike 67-1, the reasonable cost of repairs and expenses being in the amount of \$7,567.50.

## Article VI.

All and singular the premises of the within libel and the first and second causes of action thereof are true and within the maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant United States of America prays that process in due form of law, according to the course and practice of, this Honorable Court, in causes of admiralty and maritime jurisdiction may issue against Matson Navigation Company, a corporation; W. R. Eckhart; Westport Towboat Company, a corporation, and the said Tug Louie III, her engines, tackle, boilers, etc., and that all persons claiming any interest in said Tug Louie III, her engines, tackle, boilers, etc., may be cited to appear and answer on oath all and singular the matters hereinabove set forth, and that this Honorable Court may be pleased to decree to libelant its damages as claimed, with interest and costs, and the further sum of not less than \$500.00, nor more than \$2,500.00 as provided by Section 411 of Title 33, United States Code, said sum to be placed to the credit of the appropriation for the improvement of the Columbia River, where such damage occurred, and that the said Tug Louie III be condemned and sold to satisfy the claim of libelant herein and to pay libelant said damages, if any as this Honorable Court may decree to the libelant, together with costs, and that the libelant may have

such other and further relief as in law and justice it may be entitled to receive.

/s/ HENRY L. HESS,  
United States Attorney.

/s/ VICTOR E. HARR,  
Assistant United States  
Attorney.

/s/ KEITH R. FERGUSON,  
Special Assistant to the Attorney General, Proctors  
for Libelant.

State of Oregon,  
County of Multnomah—ss.

I, Victor E. Harr, being first duly sworn, depose and say that I am an Assistant United States Attorney for the District of Oregon and one of the Attorneys for the Libelant, United States of America, in the within-entitled action and that the foregoing Libel is true as I verily believe.

/s/ VICTOR E. HARR.

Subscribed and sworn to before me this 19th day of May, 1950.

[Seal] /s/ FLORENCE McKAY,  
Notary Public for Oregon.

My Commission expires 9-4-51.

[Endorsed]: Filed May 22, 1950.

[Title of District Court and Cause.]

### CLAIM FOR TUG LOUIE III.

Comes Westport Towboat Company, an Oregon corporation, and claims to be the owner of the Tug Louie III, her boilers, engines, tackle, apparel, furniture, etc., and prays for leave to defend this suit on behalf of said Tug Louie III accordingly.

/s/ MacCORMAC SNOW,  
Proctor for Claimant, Westport Towboat Company.

Service of copy acknowledged.

[Endorsed]: Filed June 12, 1950.

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[Title of District Court and Cause.]

### EXCEPTIONS

Comes Westport Towboat Company, an Oregon corporation, appearing as claimant of the Tug Louie III, her boilers, engines, tackle, apparel, furniture, etc., and also as respondent in personam, and excepts to the Libel and the whole thereof upon the following grounds:

1. Said Libel combines a claim against the Tug Louie III and its bondsmen and Westport Towboat Company, based on absolute statutory liability together with a claim for liability based on alleged fault.



2. The said Libel includes a claim against Westport Towboat Company in personam for absolute liability for dredge damage and dike damage, contrary to the Statute, and thereby seeks to take the property of the said Westport Towboat Company without due process of law.

3. The said Libel includes a claim against the Tug Louie III and its bondsmen for dredge damage contrary to the Statute and thereby seeks to take the property of the said bondsmen without due process of law.

4. The said Libel seeks to invoke the admiralty jurisdiction of the above Court for damage to a shore structure and in this connection this excepting party asserts that Section 740 of Title 46, U.S.C. is unconstitutional because it conflicts with Article III, Section 2 of the United States Constitution.

5. The prosecution of this suit is and should be barred by laches for the reason that approximately three and one-half years has intervened between the acts and occurrences alleged in the Libel and the time of filing of the said Libel.

/s/ MacCORMAC SNOW,  
Proctor for Westport Towboat Company, Claimant  
and Respondent.

Service of copy acknowledged.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

### EXCEPTIONS TO LIBEL

Comes now respondent, Matson Navigation Company, and excepts to the libel upon the following grounds:

1. Said libel combines claims against Matson Navigation Company, one based upon an absolute statutory liability, and the other upon negligence or fault.

2. The libel seeks to recover damages from Matson Navigation Company in a suit in personam based upon absolute statutory liability contrary to Title 33, Section 408, et seq. U.S.C.A.

3. The libel seeks to invoke the admiralty jurisdiction of the above-entitled court for damage to a shore structure occurring prior to the enactment of Title 46, Section 740, U.S.C.A.

4. The libel seeks to invoke the admiralty jurisdiction of the above-entitled court for damage to a shore structure under Title 46, Section 740, U.S.C.A., and said statute is unconstitutional because it is in conflict with Article 3, Section 2, of the United States Constitution.

5. The libel seeks a recovery from Matson Navigation Company, as well as others, for damage resulting from independent torts and not from tortious acts in which all of the respondents concurred or participated.

6. The damage which libelant seeks to recover resulted from accidents of navigation more than three years and five months prior to the filing of the libel and all of the facts and circumstances were immediately known and available to the libelant on the date of the accident. The claim is, therefore, barred by libelant's laches.

KRAUSE, EVANS & KORN,  
/s/ GUNTHER F. KRAUSE,  
Proctors for Respondent,  
Matson Navigation Co.

Service of copy acknowledged.

[Endorsed]: Filed June 26, 1950.

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[Title of District Court and Cause.]

### EXCEPTIONS TO LIBEL

Comes now respondent W. R. Eckhart and excepts to the libel on the following grounds:

1. The libel combines claims against W. R. Eckhart, one based upon absolute statutory liability, and the other based on alleged fault or negligence.

2. The libel seeks to recover damages from W. R. Eckhart in a suit in personam based upon absolute statutory liability contrary to Title 33, Sec. 408, et seq., U.S.C.A.

3. The libel seeks to invoke the admiralty jurisdiction of the above-entitled court for damages to

a shore installation occurring prior to the enactment of Title 46, Section 740, U.S.C.A.

4. The libel seeks to recover from W. R. Eckhart, as well as others, for damage resulting from independent torts and not from tortious acts in which all the respondents concurred or participated.

/s/ ARTHUR S. VOSBURG,

/s/ WILLIAM H. HEDLUND,

/s/ FRANK M. K. BOSCH,

Proctors for Respondent,

W. R. Eckhart.

Service of copy acknowledged.

[Endorsed]: Filed July 7, 1950.

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[Title of District Court and Cause.]

### PRELIMINARY PRE-TRIAL ORDER

A pre-trial conference was held on Monday, the 31st day of July, 1950, before the undersigned Judge, attended by Victor E. Harr, United States attorney, on behalf of the libelant; Gunther F. Krause, on behalf of Matson Navigation Company; Arthur S. Vosburg, on behalf of the respondent W. R. Eckhart; and MacCormac Snow, on behalf of the Westport Towboat Company as respondent and as claimant of the Tug Louie III, whereupon the following pre-trial order was adopted.

The purpose of this pre-trial order is to separate from the other factual and legal issues of the case

the issues having to do with the jurisdiction of this court. This pre-trial order is therefore not a complete pre-trial order because it does not state or purport to state all of the legal and factual issues of the case, but is limited to determining the legal issues raised by exceptions filed by each of the respondents and in determining the jurisdiction of this court to proceed in admiralty. For the purpose of this pre-trial order the allegations of the Libel are taken as true. In subscribing and consenting to this pre-trial order, none of the respondents waives his or its rights to deny any or all of the allegations of the Libel or to raise and submit factual issues upon any of said allegations, and each of the respondents reserves his or its right in that respect.

It is stipulated by all of the parties that at the times named in the Libel before Dike 67-1 was struck, said dike extended from the Oregon shore outwardly toward the main ship channel a distance of about 800 feet.

#### Jurisdictional Issues as to First Cause of Action

The Libel, in the first cause of action, alleges that the Tug Louie III and its tow of logs by reason of the negligence of its operators fouled the anchor line and the pipe line of the dredge and crashed into the dredge itself; that the Tug blocked the main deep water channel causing the William Harris Hardy to run against the Dike 67-1; that the Hardy through the negligence of its operator,

crashed into and destroyed approximately 100 feet of the outer end of Dike 67-1; that the first accident and damage to the dredge and appurtenances was caused by the sole negligence of the Tug and the second accident was proximately caused by the negligence of those operating the Tug and the Hardy.

All the respondents and the claimant above named contend that this court has no admiralty jurisdiction of the alleged tort to Dike 67-1. The government denies said contention and charges that this court sitting in admiralty has jurisdiction of the alleged tort to Dike 67-1.

The above-named respondents and claimant contend that this court cannot entertain in a single suit in admiralty the claim of the government for damage to the dredge and her equipment and its claim for damage to Dike 67-1. The United States denies said contention and charges that it can sue in the same admiralty court and cause for both damages.

The said respondents and claimant contend that this court sitting in admiralty cannot take jurisdiction of the alleged tort upon and damage to Dike 67-1 under the Shore Damage Act of June 19, 1948, (46 U.S.C. 740), on the ground that the occurrences alleged in the Libel took place prior to the passage of this Act and that this Act has no retroactive application. The United States denies said contention and charges that this court sitting in admiralty can take jurisdiction of the tort upon and damage to Dike 67-1 under the said Shore Damage Act.

Westport Towboat Company, as claimant of the Tugboat Louie III, further charges with respect to said Shore Damage Act that this court cannot take jurisdiction in rem of the Tugboat Louie III under said Act because of a transaction which occurred after said Act was passed because the basis of jurisdiction in rem is a maritime lien and to impose upon the said Louie III a maritime lien by the retroactive application of said Act would constitute the taking of the property of the Tug Louie III, its stipulators and claimants without due process of law contrary to the Fifth Amendment to the United States Constitution. United States denies the said contention and charges that Louie III can be held liable in rem under the Shore Damage Act for a tort occurring prior to the passage of the Shore Damage Act.

All of the aforesaid respondents and claimant charge that the said Shore Damage Act is unconstitutional as an attempt upon the part of the Congress to extend the limits of admiralty jurisdiction beyond the boundaries described in Article III, Section 2, of the United States Constitution. United States denies the said contention and charges that said Shore Damage Act is in all respects constitutional.

#### Jurisdictional and Legal Contentions With Respect to Second Cause of Action Alleged in the Libel

The second cause of suit alleges that the Tug Louie III and her tow of logs ran into and damaged the dredge and its pipe line, anchor line and

equipment and that the Hardy ran into the Dike and seeks to hold all respondents for all damages and penalties under the Act of March 3, 1899, 33 U.S.C. 408 and 412.

All of the respondents and the claimant contend that this court sitting in admiralty is without jurisdiction to entertain the claim of the government for damage and penalties under the said statute on account of the alleged injuries to Dike 67-1 and that their liability, if any, is in a court of law. United States denies this contention and charges that this court sitting in admiralty has jurisdiction of the said torts and resulting damage.

The respondents Matson Navigation Company and Westport Towboat Company deny that they are subject to any statutory liability under the said Act.

Respondents Matson Navigation Company and Westport Towboat Company and W. R. Eckhart contend that they cannot be held liable for damages to Dike 67-1 under the Act of March 3, 1899, 33 U.S.C. 408 et seq., as no facts are alleged bringing them or either of them within the purview of the said Act. The United States denies this contention.

Respondent W. R. Eckhart contends that he cannot be held liable for a fine of not less than \$500.00 or more than \$2500.00 under the Act of March 3, 1899, 33 U.S.C. 408 et seq., as the United States does not contend that he wilfully injured or destroyed Dike 67-1. The United States denies this contention.



Jurisdictional Contentions With Respect to  
Both Causes of Suit

The respondents above named, and the claimant, contend that this court is without jurisdiction to hear a suit partly in admiralty and partly upon the common law side of the court but that any two such causes of action must be separately stated and in separate complaints and separate suits. The government denies the said contention.

The said respondents and the claimant contend that this court is without jurisdiction to hear the first cause of action based upon fault and negligence together and at the same time with a cause of action based upon alleged statutory liability, but that said two causes of action should be separated in separate complaints and filed as separate suits. The government denies the said contention.

The parties hereto agree to the foregoing Preliminary Pre-Trial Order in order to determine the legal and jurisdictional questions raised by exceptions filed and for no other purpose.

Dated at Portland, Oregon, this 4th day of August, 1950.

/s/ GUS J. SOLOMON,  
Judge.

Approved:

/s/ VICTOR E. HARR,  
Of Attorneys for  
United States.

/s/ GUNTHER F. KRAUSE,  
Of Attorneys for Respondent,  
Matson Navigation Co.

/s/ ARTHUR S. VOSBURG,  
Of Attorneys for Respondent,  
W. R. Eckhart.

/s/ MacCORMAC SNOW,  
Attorneys for Tug Louie III and Westport Tow-  
boat Company.

[Endorsed]: Filed August 4, 1950.

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ORAL OPINION

October 13, 1950.

In the case of the United States of America, libelant, vs. Matson Navigation Company, et al., respondents, Civil No. 5454, by preliminary pre-trial order all of the parties consented to a trial limited solely to determining the jurisdiction of this Court to entertain libelant's claim for damages against claimant and respondents by reason of their alleged negligent injury and damage to dike No. 67-1 owned by libelant as set forth in libelant's first cause of action and for libelant's claim for damages and penalties against claimant and respondents for the injury and damage to dike 67-1 under the Act of March 3, 1899, (33 USC 408 and 412), as set forth in libelant's second cause of action.

In connection with libelant's first cause of action, I find that, prior to the enactment of the Shore Damage Act of June 19, 1948, (46 USC 740), the Court sitting in admiralty had no jurisdiction of the alleged tort to dike 67-1 and that the Shore Damage Act had no retroactive application to this accident which occurred on December 21, 1946.

In connection with libelant's second cause of action, I find that the Court sitting in admiralty has no jurisdiction to entertain claim of libelant for damages and penalties under the Act of March 3, 1899, for injuries to the dike alleged to have been damaged by claimant and respondents.

Mr. MacCormac Snow is hereby designated to prepare an appropriate order in conformity with this oral opinion.

[Endorsed]: Filed April 12, 1951.

In the United States District Court for the  
District of Oregon

In Admiralty  
No. 5454

UNITED STATES OF AMERICA,

Libelant,

vs.

MATSON NAVIGATION COMPANY, a Corporation; W. R. ECKHART; TUG LOUIE III; Her Boilers, Engines, Tackle, Apparel, Furniture, etc., and WESTPORT TOWBOAT COMPANY, a Corporation,

Respondents.

### ORDER

This cause coming on to be heard upon the Libel and the exceptions thereto filed by the respondents Matson Navigation Company and W. R. Eckhart and Westport Towboat Company, and filed also by the said Westport Towboat Company as claimant of the Tug Louie III, her boilers, engines, tackle, apparel, furniture, etc., and upon the preliminary pre-trial order, dated July 31 1950, approved by the libelant and the said respondents and the said claimant and signed by the Honorable James Alger Fee, Senior Judge of the above-entitled court, and the undersigned Judge the Honorable Gus J. Solomon having heard arguments on behalf of the libelant and the said respondents and the said claimant upon the said Libel, exceptions and pre-

liminary pre-trial order and upon the issues of law raised thereby and having then taken the cause under advisement and being now fully advised, now therefore, it is

Considered, Ordered and Decreed as follows:

1. In connection with libelant's first cause of action, this Court sitting in admiralty has no jurisdiction of the alleged negligent tort, resulting in injuries to dike 67-1 and the Shore Damage Act of June 19, 1948, (46 U.S.C. 740), had no retroactive application to this accident which occurred on December 21, 1946.

2. In connection with the second cause of action alleged in said libel, this Court sitting in admiralty has no jurisdiction to entertain the claim of the libelant for damages and penalties under the act of March 3, 1899, (33 U.S.C. 408 and 412), for injuries to the said dike 67-1.

3. The aforesaid exceptions to the libel are allowed.

4. The libel is dismissed as to the respondents Matson Navigation Company and W. R. Eckhart.

5. The libel is dismissed as to the respondent Westport Towboat Company and the Tug Louie III and said Westport Towboat Company its claimant insofar as it alleges claims growing out of the said act of March 3, 1899, for injuries to dike 67-1 and the dredge Columbia and its equipment.

6. The libelant is allowed twenty days' time

within which to file an amended libel confining its claim of damage to the dredge Multnomah and its equipment based on negligence.

Dated October 27, 1950.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed October 27, 1950.

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[Title of District Court and Cause.]

### MOTION

Comes now the libelant above named, by and through its attorneys, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, and moves the Court for an order extending the time for filing the record on appeal and docketing the within action in the Circuit Court of Appeals to ninety days from the first date of filing of said Notice of Appeal. This motion is based on the grounds that the Department of Justice requires additional time to fully consider said appeal.

Dated at Portland, Oregon, this 20th day of February, 1951.

HENRY L. HESS,  
United States Attorney for  
the District of Oregon.

/s/ VICTOR E. HARR,  
Assistant U. S. Attorney.

[Endorsed]: Filed February 20, 1951.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard ex parte this day upon motion of libelant, through its attorneys, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order extending time for the filing of the record on appeal and docketing the within action in the Circuit Court of Appeals, to enable the Department of Justice to have additional time to consider said appeal, and the Court being fully advised in the premises, it is

Ordered that the time for filing the within appeal and docketing the action be, and it is hereby extended to ninety days from the first date of the Notice of Appeal.

Made and entered at Portland, Oregon, this 20th day of February, 1951.

/s/ GUS J. SOLOMON,  
District Judge.

[Endorsed]: Filed February 20, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Matson Navigation Company and its attorney Gunther F. Krause; W. R. Eckhart and one of his attorneys, Arthur S. Vosburg; Tug Louie III and Westport Towboat Company and their attorney, MacCormac Snow:

Notice is hereby given that the United States of America, libelant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final order entered in this action on the 27th day of October, 1950, in favor of respondents and against libelant.

Dated this 17th day of January, 1951, at Portland, Oregon.

HENRY L. HESS,

United States Attorney for  
the District of Oregon.

/s/ VICTOR E. HARR,

Assistant U. S. Attorney.

[Endorsed]: Filed January 18, 1951.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS BY LIBELANT  
UNITED STATES OF AMERICA

Libelant, United States of America, hereby assigns error in the proceedings, orders, decisions and



Judgment of the District Court in the above-entitled action and Judgment and Decree entered October 27, 1950, as follows:

1. That the District Court erred in finding and entering its order and decree that the Court sitting in Admiralty had no jurisdiction of the tort alleged in the first cause of libel;

2. That the District Court erred in finding and entering its order that the Shore Damage Act of June 19, 1948, (46 USC 740) (Admiralty Jurisdiction Extension Act), has no retroactive application to the tort alleged in the libel;

3. That the District Court erred in finding and entering its decree that the District Court sitting in Admiralty had no jurisdiction to entertain libellant's claim for damages and penalties under the Act of March 3, 1899, (33 USC 408 and 412);

4. That the District Court erred in sustaining and allowing the exceptions to the libel;

5. That the District Court erred in dismissing respondent, Matson Navigation Company;

6. That the District Court erred in dismissing the respondent W. R. Eckhart;

7. That the District Court erred in dismissing the respondent Westport Towboat Company;

8. That the District Court erred in dismissing the respondent, the Tug Louie III and its claimant, Westport Towboat Company;

9. That the District Court erred in failing to retain jurisdiction in the above cause, and to cause issue to be joined on the allegations of the libel and to proceed to trial thereon.

HENRY L. HESS,  
United States Attorney.

/s/ VICTOR E. HARR,  
Assistant United States Attorney, Proctors for  
Libelant, United States of America.

Service of copy acknowledged.

[Endorsed]: Filed April 11, 1951.

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[Title of District Court and Cause.]

#### CITATION ON APPEAL

To: Matson Navigation Company, a corporation, and Gunther F. Krause, its Proctor; W. R. Eckhart and Arthur S. Vosburg, his proctor; Tug Louie III, her boilers, etc., and Westport Towboat Company, a corporation, and F. E. Wagner, their proctor:

Whereas, the United States of America, libelant above named, has lately appealed to the United States Court of Appeals for the Ninth Circuit, from the entry of an Order of the District Court entered on October 27, 1950, in the United States District Court for the District of Oregon;

You are, therefore, hereby cited to appear before the said United States Court of Appeals for the

Ninth Circuit, to be held in the City of San Francisco, State of California, at the next term of said Court thirty days after the date of this citation, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the City of Portland, Multnomah County, State of Oregon, in the Ninth Circuit, on the 11th day of April, 1951.

/s/ GUS J. SOLOMON,  
U. S. District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed April 11, 1951.

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[Title of District Court and Cause.]

LIBELANT'S DESIGNATION OF APOSTLES  
ON APPEAL AND PRAECIPE THERE-  
FOR

To: Gunther F. Krause, Spalding Building, Portland, Oregon, proctor for Matson Navigation Company; Arthur F. Vosburg, American Bank Bldg., Portland, Oregon, proctor for W. R. Eckhart; F. E. Wagner, Pacific Building, Portland, Oregon, proctor for Tug Louie III, etc., and Westport Towboat Company; and Lowell Mundorff, Clerk of the U. S. District Court for the District of Oregon.

Libelant hereby designates and requests that the

record on appeal in the above-entitled action shall include:

- (1) Libel.
- (2) Stipulation.
- (3) Claim of Westport Towboat Company for Tug Louie III.
- (4) Warrant of Arrest and Monition with Marshal's return.
- (5) Monition with Marshal's return.
- (6) Exceptions of respondent, Westport Towboat Company, a corporation, to the Libel.
- (7) Exceptions of respondent, Matson Navigation Company, a corporation, to the Libel.
- (8) Appearance of respondent, W. R. Eckhart and Motion for Extension of Time.
- (9) Exceptions to Libel of respondent, W. R. Eckhart.
- (10) Preliminary Pre-Trial Order.
- (11) Opinion of Judge Gus J. Solomon.
- (12) Order of the Court dated October 27, 1950.
- (13) Notice of Appeal.
- (14) Stipulation for change of proctors.
- (15) Application for change of proctors.
- (16) Order changing proctors.
- (17) Motion to Extend Time for filing the record on appeal and docketing the within action.
- (18) Order allowing Extension of Time.
- (19) Assignments of Errors of Libelant.
- (20) Citation on Appeal.
- (21) This Designation of Apostles on Appeal and Praeceptum therefor.

Dated this 11th day of April, 1951, at Portland, Oregon.

HENRY L. HESS,  
United States Attorney.

/s/ VICTOR E. HARR,  
Assistant United States Attorney, Proctors for  
Libelant, United States of America.

Service of Copy acknowledged.

[Endorsed]: Filed April 11, 1951.

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[Title of District Court and Cause.]

DOCKET ENTRIES

1950

- May 22—Filed libel in personam and rem.
- May 22—Issued monition to marshal.
- May 22—Issued warrant of arrest and monition to marshal.
- June 12—Filed claim for Tug Louie III.
- June 16—Filed warrant of arrest and monition with marshal's return.
- June 21—Filed monition with marshal's return.
- June 23—Filed exceptions to libel (Westport Towboat Co.).
- June 26—Filed exceptions to libel (Matson Navigation Co.).
- June 26—Filed appearance of respondent W. R. Eckhart and motion for extension of time.
- July 3—Entered order resetting exceptions to libel on July 10, 1950.

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- July 7—Filed respondent W. R. Eckhart's exceptions to libel.
- July 10—Entered order setting for preliminary pre-trial conference July 31, 1950.
- July 10—Filed motion of Westport Towboat Co. to require production of records.
- July 31—Record of pre-trial conference and order assigning to Judge Solomon.
- Aug. 4—Record of pre-trial conference.
- Aug. 4—Filed and entered pre-trial order.
- Aug. 4—Record of trial before court on questions of law argued, submitted and U. A.
- Oct. 13—Record of oral opinion and entered order that deft. prepare and submit Findings of Fact and Conclusions of Law and Judgment.
- Oct. 27—Filed and entered order dismissing libel as to Matson Navigation Co. and W. R. Eckhart, dismissing libel in part as to Westport Towboat Co. and Tug "Louie III" and allowing libelant twenty days to file amended libel.

1951

- Jan. 18—Filed notice of appeal by U. S. and copies mailed to attys. Krause-Vosburg-Snow.
- Feb. 2—Filed application for change of proctors.
- Feb. 2—Filed stipulation for change of proctors.
- Feb. 2—Filed and entered order changing proctors.
- Feb. 20—Filed and entered order extending time for filing and docketing appeal.
- Feb. 20—Filed motion for above order.

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Apr. 11—Filed assignments of error by libelant,  
United States of America.

Apr. 11—Filed libelant's designation of apostles on  
appeal and praecipe therefor.

Apr. 11—Filed citation on appeal.

Apr. 12—Filed transcript of Court's oral opinion.

Apr. 12—Filed stipulation to abide and pay decree.

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CERTIFICATE OF CLERK

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of libel, warrant of arrest, monition, claim of Westport Towboat Company, stipulation to abide and pay decree, exceptions of Westport Towboat Company, exceptions of Matson Navigation Company, appearance of W. R. Eckhart, exceptions of W. R. Eckhart, preliminary pre-trial order, transcript of oral opinion, order of October 27, 1950, stipulation for change of proctors, application for change of proctors, order changing proctors, motion for order extending time to file transcript, order extending time to file transcript, notice of appeal, assignment of errors, citation on appeal, designation of apostles on appeal, and transcript of docket entries constitute the record on appeal from a judgement of said court in a cause therein numbered Civil 5454, in





United States Circuit Court of Appeals  
For the Ninth Circuit

No. 12902

UNITED STATES OF AMERICA,

Appellant,

vs.

MATSON NAVIGATION COMPANY, a Corpora-  
tion; W. R. ECKHART, Tug LOUIE III, Her  
Boilers, Engines, Tackle, Apparel, Furniture,  
etc., and WESTPORT TOWBOAT COM-  
PANY,

Appellees.

PETITIONER'S STATEMENT OF POINTS TO  
BE RELIED ON ON APPEAL AND DES-  
IGNATION OF PORTION OF RECORD TO  
BE PRINTED

Petitioner adopts as points on appeal the Assignments of Error included in the Apostles on Appeal on file herein.

Petitioner designates for printing the entire Apostles on Appeal on file herein except the following:

Warrant of Arrest (Tug Louie III).

Monition.

Stipulation to abide and pay Decree.

Appearance of W. R. Eckhart.

Stipulation for Change of Proctors.

Application of Proctors.

## Order changing Proctors.

/s/ HENRY L. HESS, K.M.T.  
United States Attorney,

/s/ VICTOR E. HARR, K.M.T.  
Assistant United States  
Attorney,

/s/ KEITH R. FERGUSON,

/s/ LEAVENWORTH COLBY,  
K.M.T.

Special Assistants to  
the Attorney General.

[Endorsed]: Filed April 20, 1951.